Forest Practices Board

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INFO special report

Enhancing the Board's Ability to Appeal Forest Development Plan Approvals:

A Special Report on the Need to Amend Section 40 of the *Forest Practices Code of British Columbia Act* and Section 2 of the *Administrative Review and Appeal Regulation*

Background

The Forest Practices Code empowers the Forest Practices Board to appeal certain government decisions to administrative review panels[1]. Among other things, the Board is the only body that can appeal the approval of a forest development plan (FDP)[2].

This allows the Board to act when it appears that an FDP has been prepared in contravention of the Forest Practices Code. At the request of concerned citizens, or acting of its own accord, the Board can represent the public interest by appealing the approval of the FDP.

The Board's ability to appeal FDP approvals is an important safeguard that helps assure the public that FDPs—the highest level of operational plan, which sets the direction for future logging and road construction in a particular area—will meet Code requirements.

In the course of considering a recent decision by a District Manager to approve a Small Business Forest Enterprise Program FDP, it became clear to the Board that there is a need for two changes to the Code legislation, if the Board is to effectively carry out its role.

Despite Board concern that the FDP in question may not have provided adequate protection for important non-timber forest resources, the Board did not appeal the plan's approval, because it decided that the legislation did not clearly give the Board authority to do so.

There are two fundamental problems with the legislation:

- Although, the Board has explicit authority to appeal the approval of FDPs prepared for tree farm licences and forest licences, it does not have the same clear jurisdiction to appeal plans prepared by Ministry of Forests district managers for the Small Business Forest Enterprise Program (SBFEP). The Board's authority is limited to appealing 'approvals' of FDPs. Technically, SBFEP plans are not 'approved'; instead district managers "give effect" to them.
- Even if the Board had the basic right to appeal SBFEP plans, an omission in section 40 of the Code Act means that Board appeals cannot hold such plans to the same standard that other

[1] Appealing to an administrative review panel is the first step in the appeal process. If necessary, review panel decisions may be appealed to the Forest Appeals Commission. The Board's broad role in seeking administrative reviews is described in the Board publication, "The Role of the Board in Reviews and Appeals", available from the Forest Practices Board.

[2] The term "approval" is used in the general sense here, to include FDP authorizations under sections 40 and 41 of the *Forest Practices Code of British Columbia Act*.

FDPs must meet. The Code requires licensee FDPs to meet a standard that is not specifically required of Small Business FDPs.

These two issues are discussed below.

Ambiguity About Whether the Board Has Jurisdiction to Appeal the Approval of Small Business Program FDPs—The Need to Amend section 2 of the *Administrative Review and Appeal Regulation.*

Section 2 of the *Administrative Review and Appeal Regulation* states that the Board can request an administrative review of an "approval" of a forest development plan. Clearly, the Board can review licensees' FDPs that are approved under section 41 of the Act. However, FDPs for the SBFEP are not approved under section 41, but under section 40. This latter section does not refer to 'approving' those FDPs, but states that an official 'gives effect to' the plans that the Ministry of Forests has prepared.

It is likely that under section 2 the Board does not have the power to appeal a section 40 decision to "give effect to" an SBFEP FDP. Thus, the Board appears to be in the odd position of being able to challenge government approval of FDPs that licensees prepare— but not being able to challenge FDPs that were prepared by Ministry of Forest officials for the SBFEP.

The Board recommends that this section should be amended to clarify that the Board has the right to seek an administrative review of all FDP authorizations. The legislation should clearly empower the Board to appeal district managers' decisions to "give effect to" SBFEP FDPs—as well as decisions to approve licensee FDPs. This is necessary to assure the public that government is willing to apply the same checks and balances to itself that it imposes on private industry.

SBFEP FDPs Must Meet A Different Standard than Other FDPs—The Need to Amend Section 40 of the Code Act

The Code Act applies a different standard to Small Business Forest Enterprise Program FDPs than it does to those prepared by licensees. Plans prepared by licensees must specifically meet the section 41(1)(b) requirement that the plan must "adequately manage and conserve forest resources". However, section 40 of the Act, which deals with SBFEP plans, contains no such requirement.

The Board has previously recommended that section 40 of the Act be amended to be consistent with section 41—to require district managers to be satisfied that government's own operational plans for the SBFEP will "adequately manage and conserve forest resources" before they approve them.

In a complaint investigation report issued in August 1996[3], the Board recommended:

> *... that the government amend Section 40 of the Act to be consistent with Section 41. Specifically, sub-section (b) of Section 41(1), which states "the district manager is satisfied that the plan or amendment will adequately manage and conserve the forest resources of the area to which it applies" should be added to Section 40(1).*

In response, the Ministry of Forests indicated that it did not intend to implement the recommendation. The Ministry's rationale was that the *Ministry of Forests Act* contained a similar requirement, so it was not necessary to change the Code Act. Ministry officials pointed to section 4 of the *Ministry of Forests Act* as a provision equivalent to s. 41(1)(b). Section 4 states that the purposes and functions of the Ministry of Forests include:

> *(b) manage, protect and conserve the forest and range resources of the government, having regard to the immediate and long term economic and social benefits they may confer on British Columbia,*
>
> *(c) plan the use of the forest and range resources of the government, so that the production of timber*

3 See Final Report - Forest Practices Board Complaint 95036, pp. 22-23.

and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are coordinated and integrated, in consultation and cooperation with other ministries and agencies of government and with the private sector

These provisions are similar to section 41(1)(b) of the *Forest Practices Code Act*, but are not the same. Section 4 existed when the Code was created, and therefore it must be assumed that the s. 41(1)(b) requirement was written for a purpose, and added something that wasn't in section 4. Furthermore, section 4 lays out overall purposes and functions of the ministry, and does not specifically apply to FDP approvals. In addition, its reference to management and conservation is qualified by numerous other purposes, including the financial interests of government[4].

Finally, the *Ministry of Forests Act* provisions are not in the Code—and the Board is limited to appealing plans that contravene the Code. The Board cannot appeal plans that contravene the *Ministry of Forests Act*. Without an amendment, it is doubtful that the Board can appeal a SBFEP FDP which fails to adequately manage and conserve forest resources.

It is desirable to amend section 40 of the Code Act as the Board has recommended, because:

- The Code would then clearly require SBFEP FDPs to adequately manage and conserve forest resources.
- The Code would clearly demonstrate that Ministry of Forests plans must meet the same standard that government expects licensees to meet.
- The Board would be able to appeal SBFEP FDPs on the same grounds as for licensee FDPs. The Board would clearly have the right to appeal FDPs for the SBFEP if they failed to adequately manage and conserve forest resources.
- MOF officials already state that the *intent* of section 41(1)(b) applies to section 40 approvals, therefore, the change should not be disruptive.

Conclusions

In conclusion, and acting under the authority of section 189(3) of the *Forest Practices Code of British Columbia Act*, I recommend the following:

- Section 2 of the *Administrative Review and Appeal Regulation* should be amended to explicitly enable the Board to appeal the approval of forest development plans that have been prepared by Ministry of Forests officials for the Small Business Forest Enterprise Program. Specifically, the regulation should give the Board the ability to request administrative reviews of section 40 decisions to "give effect to" such FDPs.
- Section 40 of the *Forest Practices Code of British Columbia Act* should be amended to be consistent with section 41. Specifically, the provisions of sub-section (b) of Section 41(1), which require the district manager to be satisfied that the plan or amendment will "adequately manage and conserve the forest resources of the area to which it applies" should be added to section 40(1).

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4 See section 4(e) of the Ministry of Forests Act.